STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
PLAINTIFF-APPELLANT,

Michigan Supreme
Court No:

-vs-

Court of Appeals No:
315323

WILLIAM LYLES, JR.
DEFENDANT-APPELLEE.

WAYNE COUNTY CIRCUIT COURT NO: 12-08021

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WAYNE COUNTY PROSECUTING ATTORNEY
ATTORNEY FOR PLAINTIFF-APPELLANT

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150040

APPELLEE'S ANSWER TO APPELLANT'S APPLICATION

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STATEMENT OF JURISDICTION

AND RELIEF SOUGHT

Defendant accepts Plaintiff's Statement of Jurisdiction.

The Application should be denied and the Court of Appeals decision affirmed.

STATEMENT OF QUESTIONS PRESENTED

I. **DID THE COURT OF APPEALS CLEARLY ERR IN ITS DETERMINATION THERE WAS INSUFFICIENT EVIDENCE FOR DEFENDANT'S CONVICTION UNDER THE CRIMINAL ENTERPRISE STATUTE, MCL 750.159i(1).**

Court of Appeals Did Not Answer

People Answer: Yes

Defendant Answers: No

STATEMENT OF FACTS

Defendant concurs with Plaintiff's Statement of Facts, except as otherwise noted.

ARGUMENT

I. THE COURT OF APPEALS DID NOT CLEARLY ERR IN ITS DETERMINATION THE JURY WAS NOT PROPERLY INSTRUCTED WITH REGARDS TO CHARACTER EVIDENCE WHICH WAS OUTCOME DETERMINATIVE.

Standard of Review

This case involves whether the failure to properly instruct a jury in its deliberations as to how to consider character evidence presented by a defendant is reversible error.

As such, Defendant submits the standard of review involves a question of law which is reviewed de novo. *People v. Osantowski*, 481 Mich 103; 748 NW2d 799 (2008), cert denied 555 US 1015; 129 S Ct 574; 172 L Ed 2d 435 (2008).

However, a decision of the Court of Appeals is reviewed for clear error. MCR 7.302(B)(5).

Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

Argument

The prosecutor has agreed the trial court erred in its instruction to the jury regarding defendant's presentation of character evidence relating to his peacefulness. The prosecutor also agrees the trial court failed to advise the jury that 'evidence of good character alone may be sufficient to create a reasonable doubt.'

However, the prosecutor disputes the error was harmful in that it was argued in neither opening nor closing argument and suggests the 'standing alone' sentence contained in the instruction, 5.8a should never be given.

There is a long-held principle that failure to give a proper instruction on character evidence when requested and warranted is reversible error. *People v Jassino*, 100 Mich 536; 59 NW 230 (1894); *People v Lane*, 304 Mich 29; 7 NW2d 210 (942).

Further, it is the duty of the trial court to cover in his charge to the jury in a criminal prosecution the theory upon which the defense is founded if a proper request is made and supported by competent testimony. *People v Welke,* 342 Mich 164; 68 NW2d 759 (1955).

It also has been held error where there was testimony as to a defendant's general reputation, a failure to comply with the request to charge the jury that they might consider such testimony was error. *People v Simard*, 314 Mich 624, 23 NW2d 106 (1946), citing *Lane*, supra.

Here, the defense presented evidence to the jury of not only being a peaceful person but also had a reputation in the community as a peaceful person to counteract the prosecution's presentation of evidence relating to uncharged acts of alleged domestic violence. Defense requested the jury be instructed as to how to consider this evidence. Since the defendant presented evidence as to his character, the jury was required to consider that evidence, and thus should have been properly instructed.[1]

He suggests a jury should not be presented with evidence or instructed on any evidence submitted to them if it is not presented in either opening or closing argument. In effect he seeks to limit the introduction of evidence by defense on the basis of what has been argued in one's opening argument and then have the jury disregard properly admitted evidence if it is not argued

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[1] Contrary to the prosecution's position, the defense in both opening (II, 44) and closing arguments (V, 129-13) challenged the allegations of domestic violence.

in closing arguments. Taking the prosecutor's position that since it was not argued in defendant's opening or closing arguments it was not necessary to instruct the jury on this point to its logical conclusion.

Since the evidence is not mentioned in closing argument, then the jury is not required to be instructed on how to consider that evidence, ignoring any evidence submitted which was not argued in closing argument. A defendant need not make either opening or closing argument.

While the burden of proof is on the prosecution, M Crim JI 3.2, it would be logical to presume that if a defendant does not present any evidence, he would thus be barred from presenting any argument.

Here, contrary to the prosecution's argument, the defense in part challenged the allegations of the uncharged domestic violence acts by presenting evidence that defendant was a peaceful person. Unfortunately, although requested, the jury was not appraised on how to properly consider this evidence, either alone, or in the context of the other evidence. This alone was a miscarriage of justice. Given the paucity of direct evidence relating to a 30-year old crime, one cannot say a properly instructed jury would not have rendered the same verdict. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

The prosecutor further suggests the instruction should never be given because it contains a 'standing alone' sentence[2].

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[2] In its entirety, M Crim JI 5.8a, **Character Evidence Regarding Conduct of the Defendant,** reads:

(1) You have heard evidence about the defendant's character for [peacefulness / honesty / good sexual morals / being law-abiding / (*describe other trait*)]. You may consider this evidence, together with all the other evidence in the case, in deciding whether the defendant committed the crime with which (he / she) is charged. Evidence of good character alone may sometimes create a reasonable doubt in your minds and lead you to find the defendant not guilty.

While the prosecu[redacted] suggests Michigan may be inconsisten[redacted] with several federal circuits regarding this point[3], the Unites States Supreme Court has noted the privilege to introduce character evidence may be valuable to a defendant. In some circumstances, such testimony alone may be enough to raise a reasonable doubt of guilt. *Michelson v United States,* 335 US 469; 69 S Ct 213, 93 L Ed 168 (1948). Defendant would further submit he may have nothing more than his reputation and good name to offer as a defense against the forces of the government against him, especially when charged with a 30-year old capital offense.

Having offered this evidence, the jury should have been properly instructed on how to consider the evidence, together with all the other evidence, in determining his guilt or innocence, including that a defendant's good character alone may, in certain circumstances, sometimes tip the balance in his favor.

If properly instructed, a jury is informed not only may they consider the evidence together with all the other evidence in the case, in deciding whether the defendant committed the crime, but in some instances standing alone, it may be sufficient to create reasonable doubt. It does not suggest the jury disregard all the other evidence presented, nor does it suggest a defendant bears the burden of establishing his innocence.

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(2) The prosecutor has cross-examined (one / some) of the defendant's character witnesses as to whether they had heard anything bad about the defendant. You should consider such cross-examination only in deciding whether you believe the character witnesses and whether they described the defendant fairly.
(3) The prosecutor also called witnesses who testified that the defendant does not have the good character described by the defendant's character witnesses. This evidence can only be considered by you in judging whether you believe the defendant's character witnesses and whether the defendant has a good character for (*describe trait*). It is not evidence that the defendant committed the crime charged.

[3] The issue of whether a defendant is entitled to a 'standing alone' character evidence instruction has divided federal appellate courts. See *Spangler v United States*, 487 US 1224; 108 S Ct 2884; 101 L.Ed.2d 918 (1988) (White, J., dissenting from denial of certiorari).

The Court of Appeals correctly determined the jury was not properly instructed as to how to consider the evidence, because, in the words of the prosecution, the lower court 'bollixed' the instruction. The lower court properly determined, based on the minimal evidence presented, there was a miscarriage of justice. *Lukity,* supra.

The instruction, mindful of the importance of character evidence, merely reminds a jury to carefully consider the evidence relating to character, nothing more.

While the prosecution seems to suggest the jury was instructed as to character evidence, as noted by the Court of Appeals, 'the trial court refused defendant's request for a character instruction, despite defendant's presentation of evidence relating to his character for peacefulness.' Slip Op, 6. It then compounded the error by mis-instructing them.

As correctly noted by the lower court, the evidence presented by the prosecutor was minimal at best, largely circumstantial and heavily focused on a motive to establish defendant committed a murder 30 years ago, over a generation ago. Slip Op, 6.

The jury was not provided guidance as to how to consider the properly admitted evidence relating to defendant's peaceful character, vis-à-vis the numerous instances of prior bad acts defendant was alleged to have committed on a third person.

The Court of Appeals determination that a miscarriage of justice occurred in this case, given the minimal evidence presented, where the trial court failed to properly instruct the jury was correct.

The Application should be denied.

SUMMARY AND RELIEF SOUGHT

For the foregoing reasons, Defendant-Appellant respectfully requests this Honorable Court deny the Application.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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DATED: **September 18, 2014**